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Defendant(s).

(Report & Recommendation—#24)
(Motion to Amend Complaint—#28)

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1 The court has conducted a *de novo* review of the record in this case in accordance
2 with 28 U.S.C. §636(b)(1)(B) and (C) and Local Rule IB 3-2 and determines that the Report and
3 Recommendation of Magistrate Judge Cooke should be affirmed, except as to the procedure for its
4 implementation. The *Lira v. Herrera* (427 F.3d 1164 (9th cir. 2005)) case, articulated by Judge
5 Cooke, provides that where causes of action are not intertwined, that any unexhausted claims or
6 causes of action should be dismissed, proceeding on the remaining exhausted causes of action.
7 Judge Cooke found them intertwined because they all arise out of Plaintiff's medical care (or the
8 alleged lack thereof). While that is so, the Recommendation is that Plaintiff file an amended
9 complaint alleging only the fully exhausted claims. Judge Cooke had no way of knowing whether
10 Plaintiff wished to return and exhaust the claim in the third cause of action or proceed with only
11 the two. Since it appears that Plaintiff is satisfied with proceeding only on the remaining Causes
12 of Action (I and II), and Defendants have no objection to that procedure, judicial economy
13 suggests that, rather than dismissing the Complaint and requiring Plaintiff to file a new document
14 as an amended complaint, the Court merely dismiss Cause of Action III, and proceed with the
15 original complaint on Causes I and II, without the necessity of filing an amended complaint (and
16 the necessity of another responsive pleading).

17 IT IS THEREFORE ORDERED that Magistrate Judge's Report and Recommenda-
18 tion (#24) is AFFIRMED, Defendant's Motion to Dismiss is GRANTED as to Cause of Action III.

19 IT IS FURTHER ORDERED that Plaintiff's Motion to Amend Complaint (#28) is
20 GRANTED to the extent that the Cause of Action III is dismissed and this matter will proceed on
21 the original Complaint only as to Causes of Action I and II; and

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1 IT IS FURTHER ORDERED that Defendants file an answer to Causes I and II of
2 the Complaint within 30 days of the date of this Order.

3 Dated: February 9, 2006.

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7 **ROGER L. HUNT**
8 **United States District Judge**
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